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No. 92-297

IN THE
*SUPREME COURT OF THE UNITED STATES*
OCTOBER TERM 1992

JEFF KOONS,

*Petitioner,*

*—against—*

ART ROGERS and SONNABEND GALLERY, INC.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

# BRIEF FOR RESPONDENT ART ROGERS — IN OPPOSITION

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September 11, 1992

## QUESTION PRESENTED

Pursuant to this Court's Rule 15.1, we note that in Respondent Rogers' view, the questions stated in the Petition for Certiorari are not, in fact, properly presented for review in this case. Both questions are based on erroneous premises. The first question's premise is that the lower court rejected petitioner's defense of "fair use" solely because petitioner received compensation for the infringing work. The second question's premise is that the lower court rejected petitioner's argument under the parody branch of "fair use" solely because the infringed work is not sufficiently well known to be recognized as an object of the alleged parody. The lower court employed no such reasoning. As § 107 of the Copyright Act requires, it considered all of the relevant factors and concluded that petitioner did not make "fair use" of respondent's work as a matter of law on the facts presented. Neither of the considerations petitioner attempts to isolate was determinative. Accordingly, the only question concerning the "fair use" defense that can fairly be said to be presented for review is:

1. Did the court of appeals and the district court err in holding that, on the undisputed material facts in this case, no reasonable fact finder could conclude that petitioner made "fair use" of respondent's photograph in producing and marketing petitioner's sculpture?

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## BRIEF FOR RESPONDENT ART ROGERS IN OPPOSITION

Respondent Art Rogers respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's decision in this case. That decision is reported at 960 F.2d 301 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a.

This is an action for copyright infringement and unfair competition by professional artist and photographer Art Rogers, who created and owns the copyright in the photograph "Puppies". It was brought against well-known contemporary artist Jeff Koons, who obtained a copy of that photograph, tore off the copyright notice, sent it to a firm of artisans whom he

instructed to produce sculptures that, in Koons' words, "must be just like photo", (Pet. App. at 5a), and then sold the sculptures, which he titled "String of Puppies",[1] for several hundred thousand dollars.

The district court granted Rogers' motion for summary judgment of infringement, rejecting Koons' fair use defense as a matter of law, and concluding that "Koons' sculpture does not criticize or comment upon Rogers' photograph. It simply appropriates it." (Pet. App. at 34a.) The Second Circuit affirmed, concluding far more emphatically that Koons'

> copying was so deliberate as to suggest that [he] resolved so long as [he was a] significant player[] in the art business, and the copies [he] produced bettered the price of the copied work by a thousand to one, [his] piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.

(Pet. App. 2a.) Further, the Second Circuit considered and rejected Koons' argument based on the "parody" branch of "fair use", even though it was not raised below.

In considering the "fair use" defense, neither court isolated any one factor and focused on it to the exclusion of others; Rather, both courts balanced all the factors involved and concluded that no reasonable fact finder could conclude that Koons had made fair use of Rogers' photograph. Neither court suggested — as Koons suggests to this Court — that a change in any one factor would change the outcome.

The Writ of Certiorari should be denied here because (a) both the district court and the court of appeals correctly decided the

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[1] Because of the poor quality of the reproduction of the infringed work in the Appendix to the Petition (Pet. App. at 48a), the infringed work "Puppies" and the infringing work "String of Puppies" are reproduced as an Appendix to this brief, at A1-A2.

case, (b) the decision below is not in conflict with a decision in any other circuit or any controlling decision of this Court, and (c) there are no issues of sufficient importance to merit this Court's review.

## STATEMENT OF THE CASE

### *A. Art Rogers and "Puppies"*

Art Rogers has been a professional artist and photographer for over 25 years.[2] (JA[3] 32.) He makes his living by creating, exhibiting and publishing his photographic works, and making secondary use of various rights in them. (JA 32.)

Rogers made the photograph "Puppies" in 1980. (JA 34.) Jim Scanlon, the man who appears in the photograph and the sculpture, commissioned it. He knew Rogers' work and wanted what he terms "his genius, his special 'magic,' " in a portrait of a new litter of German Shepherd puppies. (JA 35, 67-69.)

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[2] Rogers has lived and worked in Point Reyes, California, a rural coastal town about 50 miles from San Francisco, since 1971. Over the course of his career, Rogers' works have been regularly exhibited at galleries and museums in California and as far away as Buffalo and Miami. In 1982, ten of his works, including "Puppies," were exhibited at the San Francisco Museum of Modern Art. His work is in the permanent collections of several museums, including the San Francisco Museum of Modern Art. Rogers and his work have, in addition, been featured in general interest and photography magazine articles, including a recent presentation of his work in a special edition of Life Magazine on the Family, and on television programs. His photographs regularly appear in his photographic column in the Pulitzer Prize-winning newspaper the *Point Reyes Light*, called "The Point Reyes Family Album." In 1986, Rogers received a Guggenheim Fellowship to further his work. (JA 32-34.) Rogers received a fellowship from the National Endowment for the Arts in 1991.

[3] Citations to "JA ____" are to the Joint Appendix filed in the Second Circuit.

After arriving at the Scanlon's home for the photo session, Rogers decided that the puppies alone would not make a successful photograph and chose to include Scanlon and his wife, Mary, holding them. (JA 35, 64-66.) At the photo session, and later in his lab, Rogers created "Puppies," drawing on his fifteen years of artistic development.[4]

After the Scanlons purchased the prints of "Puppies" they wanted, the photograph became part of Rogers' catalogue of images available for further use, from which Rogers, like most professional photographers, makes his living. (JA 32, 38, 835, 855.) The photograph has been used a number of times. "Puppies" was published in Rogers' photography column in the *Point Reyes Light* in 1980 and was exhibited, along with other works by Rogers, at the San Francisco Museum of Modern Art in 1982. A signed print of "Puppies" has also been sold to a private collector. In 1989, the photograph was licensed for use in an anthology called "Dog Days." (JA 38-39.) In addition, Rogers planned to use "Puppies" in a series of hand tinted prints of his works, and it remains available for other uses in the future, including reproduction in various forms or as the basis for various types of derivative works. It is a high quality negative that can be reproduced in virtually any size, including very large murals or

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[4] Substantial creative effort went into both the composition and production of "Puppies." For example, at the Scanlon's home Rogers selected the natural light used, the location, the bench on which the Scanlons sit and the arrangement of people and puppies. He also made creative judgments concerning f/stop and shutter speed that allowed the use of natural light, rather than introducing artificial light, which would have changed the character of the photograph. This resulted in a set of "contact sheets," containing some 50 different images, from which Rogers selected the one that was clearly "it." This decision involved, among other factors, selecting the pose and arrangement of puppies and people that would make the most successful work. In the lab, Rogers again drew on his artistic skill and judgment in printing "Puppies." This required a series of adjustments of contrast — the balance between light and dark — to get the image the way he wanted it. (JA 35-37, 54-63, JA 68-69.)

projections. (JA 37-38, 40.) A good photograph such as "Puppies" can have a long, productive useful life for its copyright owner, including a variety of both planned and unforeseen uses. (JA 39.)

Most significantly for this case, in 1984, Rogers licensed "Puppies", along with other works, to Museum Graphics, a company that produces and sells note cards and postcards with high quality reproductions of photographs by such well-respected American photographers as Ansel Adams, Edward Weston, Brett Weston and Imogen Cunningham. Museum Graphics has produced and distributed the "Puppies" notecard since 1984. (JA 34, 38-39, 44-52, 66.) In 1987 or 1988, Jeff Koons purchased at least two of these notecards. (JA 221-24, 436, 437.)

### *B. Jeff Koons and "String of Puppies"*

Jeff Koons is a well-known professional artist and sculptor residing in New York whose work is sold to the public at substantial prices and exhibited at galleries and museums in the United States and elsewhere. (JA 6, 16.) As the court of appeals noted

> He is a controversial artist hailed by some as a "modern Michelangelo" while others find his art "truly offensive." A New York Times critic complained that "Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd."

(Pet. App. 4a.)

During 1987 and 1988, Koons, financed by the Sonnabend Gallery,[5] produced a group of 20 works for what he termed his "Banality Show." (JA 179-80, 431.) All the works were sculp-

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[5] The Sonnabend Gallery in New York's Soho district paid the "production costs" of Koons' work and handled its sale and display. (JA 7, 16, 162-68.)

tures in various media, including several in "Polychromed Wood," *i.e.*, wood painted different colors. (JA 191-92, 431.) Each work was produced in an "edition" of three, meaning that three copies were initially made available for sale to the public. (JA 184-85.) A fourth copy of each sculpture was also produced for Koons personally. (JA 186, 287-88.)

Prices for the Banality Show works ranged from $50,000 to $250,000 each. The combined price tag for the 60 editions was $6.63 million. (JA 190-91.)

Koons himself did not, as he put it, "labor over the aspects of physical production of" the Banality Show works. (JA 192-93.) Others made them for him. His role was to "conceive of them" and to "oversee every aspect of production." (JA 192-93.) Italian artisans actually made the "polychromed" wood pieces in the Banality Show, including "String of Puppies," the infringing work in this case. (JA 198-99, 219, 434.)

To make "String of Puppies," Koons gave his artisans, at the Demetz Studio in Ortessi, Italy, one of the "Puppies" notecards he had purchased (after first tearing off Rogers' copyright notice), and told them to copy it. (JA 221-24, 437.) As the court of appeals explained

> [I]n order to guide the creation of a three-dimensional sculptural piece from the two-dimensional photograph, Koons communicated extensively with the Demetz Studio. He visited it once a week during the period the piece was being carved by the workers and gave them written instructions. In his "production notes" Koons stressed that he wanted "Puppies" copied faithfully in the sculpture. For example, he told his artisans the "*work must be just like photo*—features of photo must be captured;" later, "*puppies need detail in fur.* Details—Just Like *Photo!*;" other notes instruct the artisans to "*keep man in angle of photo*—mild lean to side & mildly forward—same

> for woman," to "keep woman's big smile," and to "keep [the sculpture] very, very realistic;" others state, *"Girl's nose is too small. Please make larger as per photo;"* another reminds the artisans that "The puppies must have variation in fur *as per photo*—not just large area of paint—variation *as per photo."*

(Pet. App. 5a-6a; emphasis and brackets Second Circuit's.)

After completion, "String of Puppies" was displayed at the Sonnabend Gallery in December 1988, and three of the copies were sold to collectors for a total of $367,000. (JA 431.)

Koons' use of "Puppies" to create "String of Puppies" was completely unauthorized. He never sought permission from Art Rogers to use the photograph.[6] (JA 40,-302-03.)

Rogers learned of Koons' unauthorized use through Jim Scanlon, one of the subjects of "Puppies." A friend of Scanlon's who was familiar with the photograph, called to tell him that what she took to be a "colorized" version of "Puppies" was on the front page of the calendar section of the May 7, 1989 Sunday *Los Angeles Times*. In fact, as she and Scanlon later learned, the newspaper actually showed Koons' "String of Puppies" in connection with an article about its exhibition at the San Francisco Museum of Modern Art. (Pet. App. 6a; JA 69-70, 869-70, 871.)

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[6] Koons' failure to seek permission was deliberate, not inadvertent. Koons' documents show that he was well aware that he had to obtain permission to use copyrighted material in his works. In numerous prior instances, he had asked for, and obtained, permission to use others' copyrighted material. (JA 96-132.) Further, the Italian artisans expressly called to Koons' attention the possibility that the works they made for him might infringe copyrights and that Koons was responsible for obtaining permission. They noted in a March 30, 1988 letter to Koons, "We must bring to your attention that the permission for copyright is not our business." (JA 502.)

### C. *Prior Proceedings*

After Rogers filed this action, "Both sides advised the district court at an early stage of the proceedings that, at least as to copyright infringement, disputed factual issues were unlikely and disposition on summary judgment would probably be appropriate." (Pet. App. 7a.) After discovery, the parties cross-moved for summary judgment, with Rogers' motion limited to his copyright infringement claim. The district court granted Rogers' motion as to liability and turnover relief pursuant to 17 U.S.C. § 503, but found that disputed questions of fact concerning computation of infringing profits precluded an award of damages at that time. (Pet. App. 25a-44a.) On March 27, 1991, the district court entered an injunction barring further infringement and requiring turnover of the remaining infringing work.[7] (Pet. App. 45a-46a.)

Defendants appealed to the Second Circuit. On appeal, Koons raised for the first time the argument that his sculpture was a "parody" or "satire" of Rogers' photograph, and therefore a "fair use" of that work.[8] The Second Circuit nevertheless considered

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[7] When Koons failed to comply with the turnover provision of the injunction, Rogers moved for contempt. The contempt proceedings revealed that nine days after the injunction was issued, Koons had shipped the remaining sculpture to Germany on loan to a Berlin museum. (JA 976-77.) After a hearing, the district court held Koons in contempt and ordered him to repatriate the sculpture and turn it over to Rogers. (JA 1017-18.) The Second Circuit denied Koons' motion to stay the injunction, and the sculpture has been turned over to Rogers.

[8] In the district court, Koons made no more than a "faint suggestion" at oral argument that "the sculpture, together with the other works in the 'Banality Show', were intended to comment satirically upon contemporary values." (Pet. App. 34a.) In fact, the claim that the sculpture was intended to comment on or criticize the photograph finds no support in the record. It was an after-the-fact construction by Koons' lawyers in an attempt to excuse his infringe-

(continued...)

that argument and affirmed the grant of summary judgment.[9] In considering Koons' "fair use" defense, the court of appeals fully analyzed each of the fair use factors identified in § 107 of the Copyright Act, and also noted that because "fair use" is an equitable doctrine, Koons' bad faith in willfully using Rogers' work without permission militates against a finding of fair use. (Pet. App. 13a-21a.) That court concluded that summary judgment should be affirmed because no reasonable fact finder could weigh the undisputed facts involved and conclude that Koons had made "fair use" of Rogers' photograph.

## REASONS FOR DENYING THE WRIT

1. ***The Case Was Correctly Decided Below on the Undisputed Facts*** — The district court and the court of appeals fully considered Koons' "fair use" defense and carefully weighed all the relevant factors. Both concluded that the defense must be rejected as a matter of law because no reasonable fact finder could balance the undisputed facts and find for Koons on "fair

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[8](...continued)
ment. The "message or artistic statement" of the Banality Show works that Koons articulated in the record was, "to remove the guilt and shame of the bourgeois, so that they have self-confidence to create a new aristocracy, a new upper class." Sending this message involved "us[ing] masturbation guilt to help focus the audience on what the theme is about," *i.e.*, "removing guilt and shame." (JA 385-86.) Moreover, Koons submitted affidavits from modern art experts expressly disclaiming that "String of Puppies" was attempting to comment on or criticize the Rogers photograph. (JA 897, 915-16.) Having thus contended that the two works are wholly unrelated, Koons is hard pressed to urge this Court that his sculpture draws its significance from, or delivers its message by, comment on or criticism of the photograph, or "sought to criticize the very essence of" the photograph (Pet. 21).

[9] The issue of calculation of damages and infringing profits on Rogers' copyright infringement claim, along with the unfair competition claims for relief in Rogers' complaint, are awaiting trial in the district court.

use". Those determinations were accurate and there is no reason for this Court to disturb them or review them.

Although dressed up to assert that this case raises "issues of critical importance" meriting review, at bottom, Koons' Petition for Certiorari merely urges that the Second Circuit's decision was erroneous — claiming that it "makes no sense" (Pet. 16) or complaining about "[t]he flimsiness of the court's reasoning" (Pet 17). Although we submit that it is Koons' claims of error that are "flimsy", even if his claims were well-taken, mere error below is insufficient to invoke this Court's certiorari jurisdiction. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974).

Moreover, where the decision turns on a balancing of the particular facts of the case, as was involved in rejecting Koons' "fair use" defense, grant of certiorari is an inappropriate use of the Court's limited resources. *See Texas v. Mead*, 465 U.S. 1041 (1984); *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is particularly true where, as here, both the district court and court of appeals have reached the same result. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 97n.15 (1984); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

2. ***The Second Circuit's Decision is not in Conflict with Any Other Circuit or with Decisions of this Court*** — Koons cannot, and does not, claim that the Second Circuit's decision creates a conflict among the circuits on any issue or is inconsistent with any of this Court's decisions. That being so, we submit that the case does not raise any copyright law issue of sufficient importance to merit this Court's attention in the absence of a direct conflict.

In particular, the record completely refutes what Koons terms his "most compelling argument for review here", that the "entire post-modern movement [in art] has now been placed in jeopardy by" the Second Circuit's decision that Koons' unauthorized use of Rogers' photograph infringed Rogers' copyright. (Pet. 22.) Contrary to that assertion, the record reflects that the need to

obtain permission or a license to base a post-modern artwork on another artists' copyrighted material has not significantly inhibited post-modern artists. For example, Koons holds up the work of Andy Warhol as "[o]ne well known example" of post-modernism. (Pet. 3.) As the record shows, when Andy Warhol wished to base his works on copyrighted photographs, he purchased from the photographers "the right to transform each and every" such photograph into artworks "in his style". (JA 856, 931-32.) Warhol had a long, prolific and successful career without asserting the right Koons urges to use others' copyrighted works without permission or compensation.

The record also shows that the need to obtain permission to use copyrighted works in his art has not significantly inhibited Jeff Koons himself. Prior to his Banality Show, Koons routinely, and successfully, sought written permission from copyright owners to use their copyrighted material in his artworks. (JA 96-132; see note 6 above.) Despite that practice, he was able to express himself artistically and achieved wealth, fame and critical success.

Moreover, there are an infinite number of uncopyrighted mass produced and widely distributed items that Koons and other post-modern artists can "appropriate", and have appropriated, to make their artistic statements. Koons, in fact, has "appropriated" a number of these uncopyrighted, mass-produced items — *e.g.*, basketballs, vacuum cleaners, inflatable rabbits — into prior works. Indeed, the acknowledged progenitor of post-modernism, Marcel Duchamp (Pet. 3), initiated the movement with his incorporation of an uncopyrighted urinal into a work of art.

There is thus no support whatever for the proposition Koons urges that the need to obtain permission or a license to "appropriate" copyrighted images significantly impacts the post-modern art movement.

3. ***The Issues Koons Desires to Raise Are Neither Worthy of Certiorari nor Properly Presented in this Case*** — Koons asks this Court to grant certiorari, in the absence of any conflict among the circuits, to decide (a) whether a "work of art" copied from

another artist is "actionable commercial exploitation simply because its creator was paid for that work", and (b) whether copying from another artist's work can qualify as protected "parody" or "satire" where the copied work is insufficiently well known to be recognized as the object of the parody or satire. (Pet. i.) The writ should be denied because the Second Circuit's treatment of the profit/non-profit distinction, and of Koons' parody/satire argument, in assessing the "purpose and character" fair use factor does not indicate that lower courts need this Court's guidance in these areas, and, in any event, these "questions" are not squarely presented on this record.

### *a. The Profit/Non-Profit Distinction*

As to the profit/non-profit distinction, the Second Circuit's application of the existing guidance from this Court produced an entirely reasonable result, given the undisputed facts. Without requiring any judgment on the artistic merit of Koons' work, or on Koons as an artist, the facts demonstrate such a decidedly commercial use of Rogers' work that weighing the "purpose and character" fair use factor in Rogers' favor was the only reasonable result.

The type of contemporary art that Jeff Koons produces and the Sonnabend Gallery (which Koons described as a "commercial" gallery (JA 146)) sells is a big business with enormous profits. The disparity between the $367,000 realized for the three "String of Puppies" sculptures and the $27,300 Koons paid his artisans to make them (JA 879) shows this vividly.[10] Realizing these extremely high prices for his works is not merely a byproduct of Koons' artistic endeavors, or a tribute to his professional standing, it is one of his express goals. He has stated that, "I like the idea of my work selling for a lot of money. That's very sexual to me" (JA 500), and that he produces his

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[10] The differential was similar for other "Banality Show" works. For example, the artisans received $9,470, $9,500 and $8,750, respectively for statues that sold for $125,000, $150,000 and $100,000, respectively. (JA 877-78.)

works in editions of three to accommodate "the market" (JA 501). Koons also proclaims, "I'm competitive. I don't think other artists are competitive enough . . . . I don't understand why artists don't want to expand their market share." (JA 514.)

Koons' advertising is also strongly indicative of commerciality. He used Madison Avenue style magazine advertising (JA 881-84, 370-75, 492-99), and billboard advertising (JA 326-27, 375-77), and even formed his own advertising agency (JA 892) to promote his exhibitions. He claims that his magazine ads were "about self-exploitation." (JA 501.)[11]

Further, the Second Circuit did not, as Koons charges, treat the profit/non-profit distinction as a rigid compartmentilization that turned on whether Koons received money for his work. It cited, and followed, this Court's guidance in *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 562 (1985), stating that

> the crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

(Pet. App. 14a.) As the record shows, Koons did not pay the "customary price" here. When an artist wishes to base an artwork in a medium other than photography on another artist's photograph, it is customary to purchase or license the "art rendering rights" in the photograph from the photographer. (JA 536, 836-37, 841-47, 849, 855-56.) Koons attempted to by-pass that purchase here, which would, if sanctioned by this Court, destroy the market for art rendering rights.

Thus, unless this Court is prepared to hold, as Koons appar-

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[11] Koons' claim that his works "criticize . . . the excessively commercial character of the art market" (Pet. 3 n.2) is ironic, in light of the degree of his own commerciality.

ently urges, that even such compelling indicia of commerciality as are presented here are irrelevant to fair use whenever the alleged infringing work purports to be conferring a public benefit by communicating ideas, the Second Circuit's decision shows no need for lower court guidance in this area.

Nor does the Second Circuit's decision concretely present the question Koons urges, "whether a work of art that would otherwise qualify for the copyright defense of 'fair use' becomes a form of actionable commercial exploitation simply because its creator was paid for that work". The Second Circuit made clear that its rejection of the fair use defense did not turn on a determination that Koons received money for the work, but rather was based on evaluation of all the fair use factors. That court stated

> though it is a significant factor, whether the profit element of the fair use calculus affects the ultimate determination of whether there is a fair use depends on the totally of the factors considered; it is not itself controlling,

(Pet. App. 14a) and then proceeded to evaluate the other factors. There is no indication whatever that absent payment to Koons the Second Circuit would have upheld Koons' fair use defense. In fact, that court — and the district court — found that *all* of the other fair use factors militated *against* a finding of fair use.

### *b. The Parody Branch of Fair Use*

Contrary to Koons' claim, the Second Circuit's treatment of his argument that his use of Rogers' work should be protected as parody or satire was entirely appropriate and indicates no need for this Court's guidance. Far from "flatly reject[ing]" Koons' claims of "criticism" or "comment" (Pet. 5), the Second Circuit engaged in a lengthy discussion of those issues (Pet. App. 14a-17a). Koons urges that his sculpture should be protected parody or satire because he is using another artist's work to comment

critically on some aspect of society at large. The Second Circuit rejected that position because Koons' use of Rogers' work does not seek to make its point — even in part — by drawing upon the audiences's familiarity with an original. Without that factor, there is no need for Koons to use the Rogers photograph. Koons is not "conjuring up" the "Puppies" photograph in "String of Puppies" for a satiric purpose. He is merely appropriating it.

As the Second Circuit put it, to qualify as parody or satire, "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." (Pet. App. 16a.) As the Second Circuit also recognized, that requirement is the only workable way to delimit parody and satire from mere piracy.

> We think this is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large. If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use — without insuring public awareness of the original work — there would be no practicable boundary to the fair use defense.

(Pet. App. at 16a.)

This approach is entirely consistent with all of the leading parody cases. For example, *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980), considered "I Love Sodom" sung on "Saturday Night Live" to the tune of New York's famous publicity jingle "I Love New York." The court held the "take off" a parody fair use, noting that even more than the minimum necessary to "conjure up" the original could be taken "provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." And in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert.*

*denied*, 379 U.S. 822 (1964), Mad Magazine's humorous versions of famous songs by Irving Berlin and others were held to be parody fair use. The court allowed the taking required to "recall or conjure up" the originals for humorous effect because it was necessary "if the original was to be recognized."

*Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), is similar. It found that "When Sunny Sniffs Glue" sung to the tune of the well-known "When Sunny Gets Blue" is parody fair use, stating "a parody frequently needs to be more than a fleeting evocation *of an original* in order to make its humorous point" (emphasis supplied)). *Cf. MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (a permissible parody need not be directed solely to the copyrighted original but may also reflect on life in general; however, if the original is not at least in part an object of the parody, there is no need to conjure it up, and thus no fair use); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979) (defendant's use of Disney characters in adult "counter-culture" comic book not parody fair use because more was taken than necessary to "conjure up" the original; "by copying the images in their entirety, defendants took more than was necessary to *place firmly in the reader's mind* the parodied work" (emphasis supplied)).

This body of case law is not, as Koons suggests, "rather confused". (Pet. 16.) Its soundness indicates that there is no need for the guidance from this Court in applying fair use to parody and satire that Koons urges.

Moreover, as with the profit/non-profit issue discussed above, this case does not concretely present the question Koons delineates. Nothing in the Second Circuit's decision suggests that the outcome turned on the parody/satire question. Even if that court had held that Koons' professed purpose of general social commentary entitled him to some greater fair use leeway, it might well have rejected the defense based on its balancing of other factors. For example, even where legitimate satiric purpose enhances the scope of fair use, greater than necessary copying can defeat the defense. *E.g., Air Pirates*, 581 F.2d at 758. Here,

the lower court found that the amount and substantiality of the copying (the third fair use factor) was so great that "no reasonable jury could conclude that Koons did not exceed a permissible level of copying under the fair use doctrine". (Pet. App. 19a.) A similar result might have been reached here even under Koons' view of the proper scope of parody and satire.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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# *APPENDIX*

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